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### ACHIEVING EFFECTIVE INTERNATIONAL FISHERY MANAGEMENT: A CRITICAL ANALYSIS OF THE UN CONFERENCE ON STRADDLING FISH STOCKS

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*This article is a critical analysis of Canadian and international management strategies for the Northwest Atlantic straddling fish stock. The article examines whether the proposed UN amendments to the United Nations Convention on the Law of the Sea (1982 Convention) provisions concerning straddling fish stocks effectively respond to the fundamental problems faced thus far, and whether these proposed changes are likely to be acceptable to the international community. The author submits that Canada and other nations should endorse and ratify the proposed amendments to the 1982 Convention in light of the fact that the amendments introduce substantive ecosystem approaches to fishery management and clarify the role and powers of presently existing and future international fishery organizations.*

*Cet article analyse critiquelement des stratégies de gestion des stocks de poisson qui chevauchent les zones des 200 milles des pays de l'Atlantique du Nord. L'article se demande si les modifications proposées à la Troisième Convention de l'ONU sur le droit de la mer concernant ces stocks de poisson répondent effectivement aux problèmes fondamentaux rencontrés jusqu'ici. L'article se demande par ailleurs si ces modifications seront acceptables à la communauté internationale. L'auteur suggère que le Canada et des autres pays devraient approuver et ratifier les modifications proposées parce qu'elles introduisent des stratégies de gestion qui répondent aux besoins de l'écosystème et qui clarifient le rôle et les pouvoirs des organisations internationales de pêche, y compris celles qui existent et celles qui seront établies à l'avenir.*

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The legislation is a national emergency measure pending the development of a permanent international solution, providing effective controls for high seas fisheries. The legislation gives the Government of Canada the legal authority to make regulations for the conservation of . . . "straddling" stocks.<sup>1</sup>

The ancient concept of freedom of the seas can and must be transformed into a modern and progressive ideal of rational international cooperation to ensure that irreversible ecological harm to the oceans does not become our contribution to our common future.<sup>2</sup>

The history of Canadian and international fisheries management in the Northwest Atlantic reveals the inadequacy of the current fisheries regime as provided for in the *United Nations Convention on the Law of the Sea*.<sup>3</sup>

Canada has advocated management of Atlantic high seas and straddling stock<sup>4</sup> fisheries in accordance with the 1982 Convention. Beyond its 200-mile Exclusive Fishing Zone (EFZ), Canada supports and participates in the Northwest Atlantic Fisheries Organization (NAFO), an international fisheries organization (IFO) that cooperatively manages high seas fish resources. NAFO's conservation and management measures reflect customary legal regimes for fisheries management, and to date have been deficient in managing and conserving straddling fish stocks. Consequently, Atlantic fish stocks have severely suffered from overfishing, forcing the Canadian government to apply drastic domestic and international measures. Two significant government actions include a

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<sup>1</sup> Government of Canada, Press Release B-HQ-94-20, "An Act to Amend the Coastal Fisheries Protection Act 1994" (June 1994).

<sup>2</sup> J. Carr & M. Gianni, "High Seas Fisheries, Large-Scale Drift Nets, and the Law of the Sea" in J. M. Van Dyke, D. Zelke & G. Hewison, eds., *Freedom of the Seas in the 21st Century* (Washington, D.C.: Island Press, 1993) [hereinafter *Freedom*] 272 at 287.

<sup>3</sup> 10 December 1982, UN Doc. A/CONF.62/122 (1982), 21 I.L.M. 1261 [hereinafter 1982 Convention].

<sup>4</sup> Straddling fish stocks are those stocks whose natural migration patterns exceed the political seaward boundaries established by the exclusive economic zone (EEZ). E. Meltzer, "Global Overview of Straddling and Highly Migratory Fish Stocks: The Non-sustainable Nature of High Seas Fisheries" (1994) 25 O.D.I.L. 255 at 256-57.

moratorium on all major cod fisheries inside Canada's EFZ<sup>5</sup> and amendments to the *Coastal Fisheries Protection Act*<sup>6</sup> to enable control and arrest of foreign fishing vessels in the NAFO regulatory area that disregard NAFO conservation measures.<sup>7</sup> Currently, Canada seeks international recognition for its decision to take "emergency legislative measures" with regard to the remaining fish stocks.

There is an urgent need to clarify and strengthen, through international cooperation and negotiation, the implementation of the 1982 Convention provisions on high seas fishery management, and in particular, straddling stock management.<sup>8</sup> The international

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<sup>5</sup> The moratorium on all of the major cod fisheries inside Canada's EFZ was announced on December 20, 1993 in Canada's *Atlantic Groundfish Management Plan for 1994*. Government of Canada, Press Release B-HQ-94-14E, "The Fisheries Crisis in the Northwest Atlantic" (May 1994).

<sup>6</sup> *An Act to Amend Coastal Fisheries Protection Act*, S.C. 1994, c. 14 amending R.S. 1985, c. C-33.

The amendment to the Act enables the Government of Canada to make regulations for the conservation of specific straddling stocks by (i) listing the straddling stocks to be protected; (ii) establishing the conservation and management measures that will apply on the high seas to protect the listed stocks; and (iii) listing the classes of foreign vessels to which these measures will apply. The legislation also provides for the use of force if necessary to arrest vessels, and for regulations setting out the procedures for the responsible use of force. Government of Canada, *supra* note 1.

<sup>7</sup> *Coastal Fisheries Protection Regulations*, C.R.C., c. 413, as am. by SOR/94-362. This amendment lists the straddling stocks, two classes of vessels (vessels without nationality and vessels from listed States) and the conservation measures needed to implement the prohibition of any person on a foreign vessel from fishing for any listed straddling stocks contrary to listed conservation measures. Vessels from the listed States are vessels operating under "flags of convenience" that fish or have recently fished in the NAFO Regulatory Area in disregard of NAFO conservation measures.

<sup>8</sup> The straddling stock problem is a global problem: Canada is just one of an estimated 15 coastal states facing straddling stock problems because of unregulated high seas fishing. Other stocks needing management include pollock in the "Donut Hole" of the Bering Sea and the "Peanut Hole" of the Sea of Okhotsk; orange roughy on the Challenger Plateau in the high seas off the coast of New Zealand; hake, southern blue whiting and squid off Argentina's Patagonian Shelf; jack mackerel off the coast of Chile and Peru; cod in the Barents Sea "Loop Hole" off the coast of Norway; yellowfin and skipjack tuna which Mexico views as a straddling stock problem; and in the South Pacific Ocean, beyond the limits of national jurisdiction, highly migratory stocks of tuna, dolphin, and shark. Government of Canada, Press Release B-HQ-94-18 "Global Overview of Straddling and Highly Migratory Fish Stocks" (June 1994); Oceans Institute of

community is seeking to address problems associated with high seas fisheries in several conferences,<sup>9</sup> including the UN Conference on Straddling Fish Stocks and Highly Migratory Species.<sup>10</sup>

This paper will examine the straddling stock management issue and the current proposals to resolve the problem in three parts. First, the paper will summarize problems experienced by NAFO in its implementation of management regimes in accord with the 1982 Convention. Second, the paper will examine whether the most recent draft agreement<sup>11</sup> for the Conference adequately and extensively addresses numerous criticisms of the 1982 Convention, as well as unresolved disputes between coastal states and distant water fishing states (DWFSS). Third, the paper will examine whether the draft agreement will likely be endorsed by the international community. Finally, this paper will assess whether Canada should accept the draft agreement and ratify the 1982 Convention. I submit that Canada's long-term interest in the development of effective and internationally acceptable management measures for straddling stocks necessitates that Canada adopt the Agreement's advocacy of IFO-based management regimes. The Canadian government should seek to resolve the straddling stock management problem by sup-

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Canada, *Managing Fishery Resources Beyond 200 Miles: Canada's Options to Protect Northwest Atlantic Straddling Stocks* (Halifax: Fisheries Council of Canada, 1990) at 11–13.

<sup>9</sup> Two other conferences and one Agreement have been initiated to address the high seas fishery crisis: the "International Conference on Responsible Fishing," held May 1992 in Cancun; the "FAO Technical Consultations on High Seas Fishing," held September 1992 in Rome; and the "United Nations Food and Agricultural Organization Compliance Agreement" of November 1993. The latter agreement requires parties to it to control their vessels to prevent any activity that undermines conservation measures established by IFOS. The Canadian Government considers the latter agreement to be a major breakthrough in providing international recognition that all states must comply with IFO measures. Government of Canada, Press Release B-HQ-94-15E "Conservation of Fish Stocks on the High Seas—The Evolving International Legal Framework" (May 1994); Meltzer, *supra* note 4 at 324.

<sup>10</sup> Convened through UNGA Res. 47/192, 22 December 1992, pursuant to the directive in Par. 17.50, Chapter 17, Agenda 21 [hereinafter the Conference].

<sup>11</sup> Chairman Satya Nandan's "Draft Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks" (23 August 1994) [hereinafter the Agreement].

porting international cooperative regimes rather than by extending unilaterally the jurisdictional authority of coastal states.

## I. THE 1982 CONVENTION FISHERY MANAGEMENT REGIME

The 1982 Convention hoped to establish effective fishery management regimes by enclosing fisheries within two clearly demarcated ocean areas: 200 nautical mile coastal state exclusive economic zones (EEZ) and the high seas. Theoretically, the EEZ provides globally uniform jurisdictions in which coastal states hold sovereign exploitive rights and concurrent conservation obligations.<sup>12</sup>

Although the concept is a politically-defined maritime boundary, early advocates of the EEZ concept believed enclosure of the oceans encouraged a more rational management of resources since the vast majority of living and non-living resources presently exploitable are situated within 200 miles of coastline.<sup>13</sup> The concept was popular to both developed and developing nations,<sup>14</sup> and states

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<sup>12</sup> Article 56 gives a coastal state sovereign rights within its EEZ for the purposes of exploring and exploiting, and conserving and managing living resources of the seabed, subsoil, and superjacent waters. Under Article 61, the coastal state is given management and enforcement responsibilities, rights, and interests over the living resources in the EEZ. The coastal state's rights within this region are quite extensive, including the regulation and control of fisheries and other resources, the right to make and enforce legislation over the economic exploitation of resources of the zone, and protect it against pollution and other hazards.

<sup>13</sup> Over 94% of the world fish catch, virtually all oil and gas deposits presently exploitable, and 80% of marine scientific research is conducted within the region. See M. Dhamani, *The Fisheries Regime of the Exclusive Economic Zone* (Dordrecht: Martinus Nijhoff, 1987) at 22.

<sup>14</sup> The concept was widely popular; developing coastal states advocated the concept as a means to greater control over resources (either through direct fishing by their nationals, or through controlling foreign fishing and obtaining some revenue through licence fees or contractual access to fishing technology). Moreover, in the words of the originator of the concept, the goal of an EEZ was to provide a "defensive mechanism to safeguard Africa's and developing countries' [and coastal state] interests in an increasingly hostile and acquisitive marine environment." F. Njenga, "Historical Background of the Evolution of the Exclusive Economic Zone and the Contribution of Africa" in G. Pontecorvo, ed., *The New Order of the Oceans: The Advent of a Managed Environment* (New York: Columbia University, 1986) 125 at 134.

The concept was also attractive to economically developed states who sought greater access to fisheries and were skeptical of IFO abilities to effectively regulate

quickly declared EEZs and EFZs. Accordingly, the concept became part of customary international law prior to the conclusion of the 1982 Convention.<sup>15</sup>

With regard to high seas management, Article 118 of the 1982 Convention mandates the multilateral creation of IFOS to cooperatively manage and conserve high seas resources. This provision, in conjunction with several other "obligation" provisions,<sup>16</sup> theoretically limits DWFS access to high seas resources.<sup>17</sup>

fishing. Maritime powers and DWFSs were also encouraged by the establishment of clearly defined and uniform territorial jurisdictions which, it was hoped, would eliminate the jurisdictional "creep" threat to the navigational freedoms of maritime states. See R. R. Churchill & A. V. Lowe, *The Law of the Sea* (Manchester: Manchester University, 1988) at 231; T. McDorman, "Will Canada Ratify the Law of the Sea Convention?" (1988) 25 San Diego L. Rev. 535 at 547; F. Vicuna, *The Exclusive Economic Zone: Regime and Legal Nature under International Law* (Oxford: Clarendon Press, 1982) at 238.

<sup>15</sup> By 1974, 74 States had claimed an EEZ and 15 States an EFZ, plus, by 1985, the International Court of Justice stated that it is "incontestable that . . . the institution of the exclusive economic zone . . . is shown by the practice of States to have become a part of customary law." *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, [1985] I.C.J. Rep. 13 at para. 34 as cited in Vicuna, *supra* note 14 at 238.

<sup>16</sup> Article 87 states that "The high seas are open to all States" and this freedom includes the "freedom of fishing." However, this freedom is subject to being exercised by all states "with due regard for the interests of other States." Article 116 also makes the right to fish subject to treaty obligations and the "the rights and duties as well as the interests of coastal States provided for, *inter alia*, in Article 63, paragraph 2, and Articles 64 to 67" [articles concerning inter-zonal species]. Article 117 explicitly provides that all states have a duty to take, or to cooperate with other states in taking appropriate enforcement measures for their respective nationals as is necessary for the conservation of the fishery resources.

<sup>17</sup> Traditionally, customary international law since the 18th century considered fish in the high seas to be "free," both *res nullius* and *res communis* on the basis that the waters were not susceptible to effective occupation, that the resources were inexhaustible, and that a specific use of the oceans did not impair other uses. A. W. Koers, *International Regulation of Marine Fisheries: A Study of Regional Fisheries Organizations* (London: Fishing News, 1973) at 16.

By the mid-20th century such notions were both antiquated and politically outdated. They were antiquated in the sense that the development of technology resulted in greatly expanded resource-harvesting techniques in various fishery and resource industries. They were politically outdated in the sense that the freedom of the seas notion was developed in support of colonial desires for the seas to be considered international highways for efficient communication and commerce. However, this view of the high seas benefited only those nations who could access high seas resources. This select group did not include many of the newly independent developing States. Njenga, *supra* note 14 at 127, 134.

The 1982 Convention recognizes that the 200-mile regime does not satisfactorily address the management of several inter-zonal species that migrate seasonally or during their life-cycles. Accordingly, Article 63.2 mandates the establishment of IFOs to reduce ambiguities concerning who manages fish stocks that straddle both an EEZ and the high seas. Article 63.2 directs both coastal and high seas states "fishing for such stocks to agree directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area."

## II. NAFO: A MODEL FISHERY BODY UNDER THE 1982 CONVENTION

NAFO was seen by its members<sup>18</sup> and the international community as an early effort to implement the spirit of cooperation called for in Articles 63(2) and 118 of the 1982 Convention.<sup>19</sup> NAFO was established as a consequence of the extension of coastal jurisdiction by Canada and the United States in 1977. Its mandate is to

contribute through consultation and cooperation to the optimum utilization, rational management and conservation of the fishery resources of the Convention Area. NAFO promotes contemporary ideas for international collaboration in the high seas based on the scientific research fundamentals.<sup>20</sup>

NAFO manages an area called the Regulatory Area, which is that part of the Convention Area which lies beyond the areas in which coastal states exercise fisheries jurisdiction.<sup>21</sup>

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<sup>18</sup> NAFO currently has 15 contracting parties: Bulgaria, Canada, Cuba, Denmark (with respect to the Faroe Islands and Greenland), Estonia, the European Union (EU), Iceland, Japan, Korea, Latvia, Lithuania, Norway, Poland, Romania and the Russian Federation. Government of Canada, *supra* note 5.

<sup>19</sup> *Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries* [hereinafter NAFO Convention], *NAFO Handbook* (Dartmouth: The Headquarters of NAFO, 1994) at preamble; B. Applebaum, "The Straddling Stocks Problem: The Northwest Atlantic Situation, International Law, and Options for Coastal State Action" (paper prepared for the 23rd Annual Conference of the Law of the Sea Institute, 12–15 June 1987, Noordwijk aan Zee, The Netherlands) at 3,14; Oceans Institute, *supra* note 8 at 25.

<sup>20</sup> NAFO Convention, *ibid.* at introduction.

<sup>21</sup> *Ibid.* at Article 1.2.



Six of the ten identified fish stocks in the NAFO Regulatory Area are defined as "straddling stocks" as their biomass "straddle" the Canadian 200-mile EFZ limit.<sup>22</sup> NAFO's management structure provides a forum for cooperation among contracting parties with regard to the study, appraisal and exchange of scientific information and views relating to the fisheries of the Convention Area.<sup>23</sup> Furthermore, on the basis of advice from scientists who represent member states, NAFO sets total allowable catch (TAC) limits, establishes other conservation measures, and allocates quotas to NAFO contracting parties for the listed managed stocks.<sup>24</sup>

### III. PROBLEMS FACED BY NAFO IN MANAGEMENT OF STRADDLING STOCKS

Currently, the Northwest Atlantic straddling fish stocks are in a precarious state. The NAFO Scientific Council has reported that the southern Grand Banks cod stock is at the lowest level recorded, and total allowable catches of groundfish across the Canadian EFZ have declined 75% since 1988.<sup>25</sup> Consequently, in 1992 the Canadian government declared a moratorium on the fishing of northern cod, Atlantic Canada's most important commercial fish stock. In 1993 all major cod fisheries within Canada's EFZ were closed and quotas for most other groundfish species were sharply restricted. Since 1993, NAFO has also imposed moratoria on certain stocks in its Regulatory Area in order to be consistent with Canada's conservation decisions.

There are a number of factors<sup>26</sup> causing the present decline. However, it is generally agreed that overfishing and irresponsible fishing by the Canadian offshore trawler fleet and the foreign fishery outside the 200 miles limit have been critical destructive factors.<sup>27</sup>

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<sup>22</sup> Applebaum, *supra* note 19 at 2; Meltzer, *supra* note 4 at 297.

<sup>23</sup> Oceans Institute, *supra* note 8 at 27.

<sup>24</sup> *Ibid.* at 17-18; Government of Canada, *supra* note 5.

<sup>25</sup> Government of Canada, *supra* note 5.

<sup>26</sup> Other causes include human-induced distortions in predator/prey relationships and environmental factors (decreasing water temperatures, oceanic salinity changes). Meltzer, *supra* note 4 at 297.

<sup>27</sup> *Ibid.* at 297; Oceans Institute, *supra* note 8 at preface.

From a Canadian perspective, the critical problem with NAFO's present management structure is its inability to regulate and enforce the TACs and quotas allocated to its member states, as well as to regulate non-member fishing states. This is particularly important to Canada since important stocks of cod, flounder and redfish have been over-exploited outside of Canada's Grand Banks, on what is known as the Nose and Tail.

NAFO's problems can be summarized as follows: (i) the susceptibility of conservation strategies to domestic pressures of member parties; (ii) the ability of members to object to assigned TACs which permits unilateral setting of quotas; and (iii) the inability of NAFO members to effectively impose conservation measures on member and non-member fishing vessels fishing in the Regulatory Area.

### 1. Ineffective Conservation Strategies:

Article II of the NAFO Convention establishes that parties are to co-operatively manage resources by following standards set by the Scientific Council and managed by the Fisheries Commission. In establishing fish quotas, Article 11 subparagraphs 2 and 3 state that the Fisheries Commission should "achieve the optimum utilization of the fishery resources of the Regulatory Area" as qualified by the need for consistency between coastal state and Regulatory Area quotas. However, critics have noted that term "optimum utilization" does not provide assistance for states in determining allowable catches.<sup>28</sup> Consequently, the potential for dispute as to the appropriate measurement allows states to justify a variety of conservation measures, including measures to satisfy short-term economic interests.<sup>29</sup> The conflict between the European Union (EU) and NAFO demonstrates that the lack of common agreement as to proper management reference points severely hinders NAFO objectives.

Between 1979 and 1985, NAFO parties abided by TACs set by NAFO that were determined in accord with what Applebaum calls the "two pillars" of the conservation structure: a "conservative" conservation in the setting of TACs in the form of "F.O.1,"<sup>30</sup> and the

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<sup>28</sup> Oceans Institute, *supra* note 8 at 32.

<sup>29</sup> *Ibid.* at 33; FAO Fisheries Department., *FAO Technical Consultation on High Seas Fishing* FIPL/484 (Suppl.) (Rome: Food and Agriculture Organization of the United Nations, 1992) at 38 [hereinafter FAO].

<sup>30</sup> F.O.1 is a means to set TACs at a level below the "maximum sustainable yield" (MSY) in order to provide a cautionary barrier that minimizes dangers inherent in

maintenance of traditional proportionate shares for the member countries.<sup>31</sup>

In 1985, the EU changed its position, claiming that NAFO reference points were (i) unduly restrictive, (which resulted in the loss of previous catches), and (ii) failed to recognize the Communities' socio-economic problems.<sup>32</sup> The EU subsequently refused to be bound by NAFO conservation reference points, and established its own Maximum Sustainable Yield quotas on an Fmax basis. These levels were consistently set above both NAFO quotas<sup>33</sup> and the EU member states' historical stock share.

The domestic problems referred to by the EU as the motivating force for disputing NAFO stock quotas included the scheduled entrance of Spain and Portugal into the EU. The entrance of these two states considerably expanded the total number of EU fishermen and led to a 75% increase in fishing capacity, a 45% rise in production for human consumption, and a 43% increase in fish consumption in the enlarged Community.<sup>34</sup> The inclusion of Spain and Portugal also implied that the EU allocation would be divided amongst more states, lessening proportional harvests of member states.<sup>35</sup>

## 2. NAFO Objection Procedures

The ability of the EU to accommodate its domestic pressures by objecting to NAFO's management reference points and using an alternative, higher yielding measurement, was sanctioned by NAFO Convention objection procedures. Article XII of the NAFO Convention permits any contracting party to object to and not

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the possibility of errors in scientific assessments of stocks and provide consistency in the annual catches.

<sup>31</sup> *Supra* note 19 at 3.

<sup>32</sup> Oceans Institute, *supra* note 8 at 39.

<sup>33</sup> The EUS 1989 quota for the NAFO fishery was set at 160,000 tons, 12 times higher than the 13,000 tons allocated by NAFO. Total 1990 EU catches from NAFO managed stocks were estimated to be five times higher than the quotas "officially" allocated, and almost three times the EU's autonomous quotas. Meltzer, *supra* note 4 at 299.

<sup>34</sup> Oceans Institute, *supra* note 8 at 39.

<sup>35</sup> Evelyn Meltzer has also noted that another change in internal EU problems led to further increases in unilateral quotas in 1990; the EU increase in 1990 coincided with Namibia's extension of jurisdiction which displaced many Spanish and Portuguese vessels that fished those waters. These same vessels transferred their efforts to the Canadian Grand Banks, either under EU flags or reflagged as non-contracting parties to the NAFO area. See *supra* note 4 at 299.

comply with Council proposals and "binding" measures.<sup>36</sup> From 1986 onwards, the EU repeatedly used the objection procedure so as to not comply with most of the management measures adopted annually by the NAFO Fisheries Commission.

### 3. Enforcement Measures

Article XVII authorizes flag states to impose sanctions for violations "as may be necessary to make effective the provisions of the Convention and to implement any measures which become binding . . . ." The imposition of sanctions is ineffective if the flag state, such as the EU, objects to the binding measure.

Moreover, these enforcement measures permit many non-NAFO-member fishing state vessels as well as member state vessels flying "flags of convenience" to harvest fish stocks in the NAFO Area with impunity and without regard to NAFO conservation measures.<sup>37</sup>

Thus, the NAFO Convention uses vague terms to guide the establishment of TACs, permits states to object to its conservation measures, and relies on flag state enforcement. This has permitted, and even legitimized, overfishing, which makes NAFO an ineffective management regime.

## IV. DEFICIENCIES REVEALED IN THE 1982 CONVENTION

NAFO's inability to resolve internal member disputes and to enforce coastal management regimes highlight IFO problems under the 1982 Convention provisions. The following is a brief analysis of the inadequacies of the 1982 Convention.

First, the EEZ/high seas demarcation of jurisdictions does not address what Arvid Pardo calls the "inclusive" nature of fish.<sup>38</sup>

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<sup>36</sup> NAFO Convention, *supra* note 19 at 20.

<sup>37</sup> These nations include: the United States, Mexico, Chile, Panama, Mauritania, Venezuela, the Cayman Islands and South Korea. *Ibid.* at 299; Oceans Institute, *supra* note 8 at 30.

<sup>38</sup> A. Pardo suggests that the 1982 Convention provisions create "100 different sovereignties of management" that provide well for exclusive uses of the sea but do not adequately govern inclusive uses of the sea, including management of migratory stocks." To Pardo, these provisions guarantee a permissive freedom, a negative freedom that encourages the use of the sea without responsibility for its consequences. In contrast, the author suggests that what is needed is a positive

Although a great majority of fishery activity does occur within the EEZ limits, the 1982 Convention conveys the impression that most fish stocks confine themselves to the EEZ of a single coastal state. This impression is simplistic and inadequate as the nature of fish is to migrate, often well beyond the 200-mile jurisdiction of the coastal state.<sup>39</sup> Since coastal state conservation and management regimes are enforceable only on fishing activities within the 200-mile jurisdiction, the functional effectiveness of straddling stock conservation measures is severely impaired. As an example, roughly 10% of the Grand Banks extend beyond Canada's EFZ, and many stocks straddle Canada's EFZ waters into two geographical areas referred to as the Nose and Tail of the Grand Banks. Under the 1982 Convention EEZ regime, Canada cannot enforce its conservation measures on these stocks or those fishermen harvesting these stocks beyond its EFZ.

Second, the 1982 Convention relies on states to establish IFOS for high seas management. Based on the fact that most IFOS are reactive institutions, in the sense of being organized in order to respond to a management crisis, the provisions have the effect of severely compromising the fishery resource needing management.<sup>40</sup>

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freedom, permitting use of the seas with positive duties to manage what is to be utilized. See A. Pardo, "Perspectives on Ocean Governance" in *Freedom*, *supra* note 2 at 39.

<sup>39</sup> Churchill & Lowe, *supra* note 14 at 234; Dhamani, *supra* note 13 at 156.

<sup>40</sup> Fisheries have historically been allowed to develop relatively unmonitored until the resource industry reaches a crisis stage, demonstrated by overcapitalization, excess capacity, intensive competition, decline in catches, and/or a negative and severe impact on non-target species. J. Carr & M. Gianni "High Seas Fisheries, Large-Scale Drift Nets, and the Law of the Sea" in *Freedom*, *supra* note 2, 272 at 287.

Moreover, IFOS have had limited success once established; few IFOS have access to independent research staffs, and hence are reliant on national scientists who disagree on the appropriate scientific data to be used. Also, as NAFO demonstrates, IFOS are rarely given the competence to regulate the fisheries directly, and hence have had their recommendations defied and enforcement procedures negated by flag state non-cooperation. W. Burke "Unregulated High Seas Fishing and Ocean Governance" in *Freedom* *supra* note 2, 235 at 244.

## V. IMPROVEMENTS NEEDED TO 1982 CONVENTION

There is considerable discussion concerning changes needed to the 1982 Convention in order effectively to address the straddling stock management problem. The discussion has focussed on three problem areas: (i) a need for an ecosystem framework and clarification of IFO management guidelines; (ii) the need for a precise definition of competencies between coastal states and DWFS within the management structure of an IFO; (iii) elaboration and clarification of the respective legal rights and obligations of coastal states, DWFS, and IFO managerial bodies.

### 1. Clear Guidelines Mandating Ecosystem Management Regimes

IFOs need guidelines for adopting conservation measures with respect to high seas fisheries.<sup>41</sup> As discussed earlier, the uncertainty as to what constitutes "optimum management" permits states to dispute what constitutes "scientific data" and what is an "unreasonable catch." In turn, this uncertainty permits policy-makers to appease domestic fishery interests by setting high TACs. New reference points need to be developed and agreed to which establish acceptable and biologically safe impact levels. These reference points must not only be based on a single-species approach but also be part of a strategy that includes multi-species and ecosystem realities.<sup>42</sup>

Article 119 of the 1982 Convention recognizes that fishery management decisions must be made on uncertain and limited information when it stipulates that states "shall take measures which are designed on the best scientific evidence available." This was designed so that states would not continue to fish in an unregulated fashion with the pretext of incomplete information.

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<sup>41</sup> Oceans Institute, *supra* note 8 at 33

<sup>42</sup> The management reference points must be set with regard to numerous factors, such as the need for a selective catch via controls on various gear used in different areas in different seasons so as to account and allow for the reproductive requirements of stocks, both target and non-target. The reference points should permit reproduction and regeneration of stocks. Similar ideas must be applied to ensure reduced capture of non-target stocks, endangered species, species in "protected" stages such as times of spawning or juvenile stages. FAO, *supra* note 29 at 53.

This provision is insufficient: states have taken advantage of the opportunity to disagree on what is deemed “evidence” and “best.” Hence, changes and elaborations to the 1982 Convention must clarify what approach is to be taken in regard to these uncertainties, and whether a precautionary approach should be taken when there is a lack of definitive information.

## 2. Precise Definition of Competencies Between Coastal States and DWFSS, Under the Umbrella of an IFO

IFOs are a meeting point for the divergent interests of coastal states and DWFSS. In order for states successfully to establish IFOs to manage competing interests, a globally applicable document such as the 1982 Convention should provide constructive guidelines on the establishment of management procedures, allocation factors, and enforcement mechanisms.

The FAO has examined the requirements necessary for a successful IFO. Key factors that should be included in a UN Convention providing guidelines for states to establish an effective IFO include provisions mandating the need for:

- a clearly defined and mutually accepted purpose for the IFO.
- mechanisms for the timely, accurate and complete supply of scientific data by members.
- neutral and impartial IFO Councils.
- agreement by parties to immediately adopt effort levels determined by IFO Councils.
- clarification of flag State responsibility.
- clearly defined and operable dispute resolution procedures.<sup>43</sup>

## 3. Clarification of Legal Rights and Obligations

The combination of flag state powers and the lack of clarity in Article 63(2) of the 1982 Convention demonstrate that future elaboration on the straddling stock problem must address who has authority to impose conservation measures, on whom, and to what degree. Presently, authors who have sought to find a legal justification to permit coastal state and IFO enforcement of conservation measures on foreign vessels fishing a managed stock must make

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<sup>43</sup> FAO, *supra* note 29 at 45–51.

lengthy and speculative arguments. This reveals the need for a clarification of powers.<sup>44</sup>

As an example, Burke and Miles suggest that if it is accepted that the 1982 Convention was designed to create single management units (EEZs or IFOS), then Article 87.2 ("freedom to fish") can and should be qualified by Articles 63.2, 118 (duty to adopt conservation measures) and Article 56 (coastal states have sovereign rights over the resources within their EEZ). The authors allege that this interpretation gives authority for coastal states to preserve their EEZ sovereign rights by restricting high seas fishing where they can show (i) a relationship between the stocks inside and outside the EEZ, and (ii) that conservation measures on the high seas are necessary for efficient conservation of the fishery within the EEZ.<sup>45</sup>

## VI. THE UN CONFERENCE

The UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks has a mandate to address the problems identified thus far.<sup>46</sup>

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<sup>44</sup> See Applebaum, *supra* note 19; K. Sullivan, "Conflict in the Management of a Northwest Atlantic Transboundary Cod Stock" (1989) 13 *Marine Pol'y* 118; C. Joyner, "Chile's Presential Sea Proposal: Implications for Straddling Stocks and the International Law of Fisheries" (1993) 24 *O.D.I.L.* 99; see especially E. Miles & W. Burke, "Pressures on the United Nations Convention on the Law of the Sea of 1982 Arising from New Fisheries Conflicts: The Problem of Straddling Stocks" (1989) 20 *O.D.I.L.* 343 [hereinafter "Pressures"]; and W. Burke, "Fishing in the Bering Sea Donut: Straddling Stocks and the New International Law of Fisheries" (1989) 16 *Ecological L.Q.* 285 [hereinafter "Donut"].

<sup>45</sup> "Donut," *ibid.* at 302.

<sup>46</sup> Chapter 17 of Agenda 21 states that the Conference will be organized to promote effective implementation of 1982 Convention provisions by (i) identifying and assessing existing conservation and management problems of such fish stocks, and (ii) formulating means of improving cooperation on fisheries which are consistent with the Convention provisions. UNCED, *Agenda 21: Programme of Action for Sustainable Development* (New York: UN Dept. of Public Information, 1993) 155. See also The Chairman's "A Guide to the Issues Before the Conference Prepared by the Chairman" (UN Doc. A/CONF. 164/10 (24 June 1993), para. 12) as found in Payoyo, *infra* note 60.

It should be noted that the UN Conference was not the first international meeting in which there were proposals to clarify the ambiguities of the 1982 Convention; during UNCLOS III, Canada and other coastal States were dissatisfied with Article 63 and submitted a compromise proposal that gave a mandate for tribunal-based resolution of conservation measures for straddling stocks. The aim was to



The Conference has completed three sessions, with a final session scheduled in the spring of 1995. Chairman Satya Nandan's draft Agreement seeks to resolve contentious issues remaining at the end of the second and third sessions. Evelyne Meltzer, who attended the organizational and substantive sessions of the Conference as a representative of UN Association in Canada, summarized the outstanding problems after the second session as follows. A critical issue of debate between coastal states and the DWFSS concerns whether the coastal state should be recognized as having a special interest in ensuring that measures on the high seas are compatible with their adjacent EEZ measures. Many DWFSS argue that fish stocks should be managed as a biological unit, and not be divided among political boundaries.<sup>47</sup> Many coastal states consider this position as an unjustifiable interference with their EEZ sovereign rights. Second, there remains concern for the nature of flag state responsibility over vessels on the high seas. Third, although most states agreed that the precautionary principle should be implemented as a management tool, greater definition of the concept is needed. Fourth, states disagreed on the implications of the Conference; coastal states want a legally binding convention while DWFSS want general recommendations for straddling stock management that are to apply within and beyond the EEZ.<sup>48</sup>

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encourage consistency between EEZ conservation and the measures to be established by the tribunal. This was not adopted. Again, at the 1992 UN Conference on Environment and Development (UNCED) the Santiago Group of over 40 like-minded states concerned with the status of high seas living resources introduced a document, A/CONF. 151/PC/WG.II/L.16/Rev.1, that sought to consolidate and codify the customary international law regarding management principles for fishing on the high seas and introduce conservation, management, and enforcement measures. This proposal was excluded from the Agenda 21 text because it was not unanimously accepted. However, as a compromise, the UN Conference was established. See UN Doc. A/CONF. 62/L.114, (13 April 1982); Meltzer, *supra* note 4 at 323.

<sup>47</sup> *Ibid.* at 326.

<sup>48</sup> On a more positive note, the FAO successfully developed an agreement on the issue of flagging and reflagging of fishing vessels on the high seas. See "Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas." The Agreement was adopted in 1993 and will enter force with the 25th instrument of acceptance. *Ibid.* at 326.

## VII. EVALUATION OF THE DRAFT AGREEMENT

The following analysis examines the Chairperson's Draft Agreement. It will critically examine the document by evaluating how well it responds to the criticisms noted earlier regarding the vagueness of responsibilities found in the 1982 Convention, and the disputes remaining at the UN Conference. This will entail an examination of the Agreement's provisions in four parts: (i) general principles applicable to fishery management regimes; (ii) rights and duties of officials of IFOs, flag states, and all fishing states; (iii) dispute settlement procedures; and (iv) resolution of allocation issues.

### 1. General Principles

The preamble to the Agreement states that all parties are to take note that cooperation between parties has been lacking, that the problems identified in Agenda 21, chapter 17 must be addressed,<sup>49</sup> and that more effective enforcement measures must be adopted for the conservation and management of such stocks.

The Agreement considerably enhances aspects of an ecosystem management framework found in the 1982 Convention. In so doing, the Agreement includes and adopts what David VanderZwaag calls an "integrated" approach to international cooperation and coordination. An approach is integrated when it harmonizes management at regional and global levels by addressing the competing uses and effects of resource utilization on the larger ocean ecosystem.<sup>50</sup> Moreover, the Agreement accommodates the growing belief that a guideline document such as the Agreement needs to mandate that states take a multi-species and regional approach to fishery management.<sup>51</sup>

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<sup>49</sup> Problems identified include: inadequate management of stocks, overutilization of some resources, problems of unregulated fishing, over-capitalization, excessive fleet size, vessels reflagging to escape controls, insufficiently selective gear, unreliable databases and a lack of sufficient cooperation between states. See preamble to draft Agreement.

<sup>50</sup> "The Concept and Principles of Sustainable Development: 'Rio-formulating' Common Law Doctrines and Environmental Laws" (1993) 13 Windsor Y.B. Access Just. 39 at 44-45.

<sup>51</sup> Several ecological and NGO groups attending the UN Conference are enthusiastic about the draft Agreement's extensive assertion of ecosystem principles. See "Joint NGO Statement to the Final Plenary of the Third Substantive Session of the UN Conference on Straddling Fish Stocks & Highly Migratory Fish Stocks"

The Agreement repeats Article 119 ("the best scientific evidence available" to establish msys as qualified by environmental factors) in Article 5(b). However, several related Articles elaborate further on what environmental measures states are to consider. Article 2 states, "The objective of this Agreement is to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks." Article 5 describes the ecological framework in which states shall give effect to this goal. States shall

(d) adopt, where necessary, conservation and management measures for other species belonging to the same ecosystem or dependent on or associated with the target species, with a view to maintaining or restoring populations of such species above levels at which their reproduction may become seriously threatened;

(e) promote the development and use of selective, environmentally safe and cost-effective fishing gear and techniques in order to minimize pollution, waste, discards, catch by lost or abandoned gear, catch of non-target species . . . and impacts on ecologically related species . . . ;

(f) take into account the need for protecting biodiversity; [and]

(g) take measures to eliminate over fishing and excess fishing capacity.<sup>52</sup>

Second, the Agreement gives considerable guidance as to what constitutes "over fishing" in its application of the precautionary principle.<sup>53</sup> In so doing, the Agreement satisfactorily responds to considerable criticisms concerning previous applications of the precautionary principle in ocean regimes.

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(26 August 1994); Commentary, "Draft Treaty + Political Will = Hope for Global Fisheries" (1994) 88 ECO 1.

<sup>52</sup> The Agreement, article 5.

<sup>53</sup> The principle has several definitions and, as will be discussed later, can be interpreted to varying degrees of precaution. An acceptable definition includes two notions: (i) that environmental control measures should not depend on or wait for scientific certainty of cause-effect link; and (ii) the presumption that it is better to err in decision-making on the side of caution. See VanderZwaag, *supra* note 50 at 46.

The FAO notes that the precautionary principle has long been advocated even though rarely applied in practice.<sup>54</sup> Moreover, when the principle is applied, there is often a lack of certainty with regard to the required control measures and levels of acceptable risk because of absence of certainty in scientific data.<sup>55</sup>

Unlike previous applications of the term, the Agreement gives substantial guidance to future IFOS and fishing states as to where the principle shall be considered and to what degree. The draft Agreement applies the precautionary principle as a general principle underlying all conservation, management and exploitation measures of straddling stocks (Article 6.1). As with Article 119.1 of the 1982 Convention, Article 6.2 mandates that the "best scientific evidence available" is to be used. However, in order to reduce inter-state bickering regarding what is permissible evidence, the Article continues by saying "States shall be more cautious when information is poor. The absence of adequate scientific information *shall not* be used as a reason for postponing or failing to take conservation and management measures" (emphasis added).

The precautionary approach is explicitly to be used to set stock-specific minimum management standards, which Article 6.3b states will take into account the realities of present scientific uncertainties relating to the size and productivity of stocks, precautionary reference points, levels of mortality, and environmental and socio-economic conditions.

Importantly, Article 6.3d and Annex 2 establish guidelines for determining precautionary reference points, and the type of immediate action to be taken if they are exceeded. Annex 2 advocates strategies that constrain harvesting within safe biological limits, ensure limited risk of over-harvesting, and account for situations of poor information on specific stocks by establishing provisional reference points to similar and better-known stocks.

Hence, in light of these provisions, "overfishing" would include fishing above a cautious level when the information described above is uncertain or inadequate. International acceptance of these provisions would clarify the "F.O.1" versus "Fmax" debate evident between NAFO and the EU in favour of NAFO. These provisions will hopefully reduce such inter-member disputes for future IFOS.

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<sup>54</sup> *Supra* note 29 at 42.

<sup>55</sup> VanderZwaag, *supra* note 50 at 49.

Annex 2 has come under some criticism, however. Judith Swan, an NGO representative at the UN Conference, states that participants in the UN Conference inter-session "informal" meetings cannot determine how the principle would be applied in practice as it is presently described in Annex 2.<sup>56</sup> Though there is still confusion as to its application, one should not lose sight of the fact that state parties are examining the concept and trying to understand its proposed implementation. These factors bode well for the application of the concept generally in fisheries management and specifically in the UN Conference.

Article 6.2 constructively reverses the burden of proof between science and decision-making fishery authorities; policy-makers and industry officials can no longer argue real or pretended uncertainties in order to avoid difficult decisions. Instead, policy decisions must be made on whatever scientific evidence is available or can be provisionally referred to in order to set cautionary measures.<sup>57</sup> As the FAO notes, this practice is essential for effective anticipatory, rather than reactive, management.

It should also be noted that the draft Agreement's interpretation of the precautionary principle does not threaten the viability of the fishing industry because of the absence of certainty in fishery data. This is in contrast to the stringent application of the precautionary principle advocated by the United States with regard to the driftnet controversy.

The United States policy statement on Large-Scale Pelagic Driftnets<sup>58</sup> advocated a new standard in fishing, including an application of the precautionary principle that would preclude a particular fishery from proceeding unless it was shown that it could be conducted without unacceptable impacts. Amongst other criticisms, William Burke finds this extreme interpretation of the principle and its application to the fishing industry unduly restrictive: he believes this type of "precaution" would ensure the termination

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<sup>56</sup> J. Swan, Oceans Institute of Canada representative at the UN Conference, in a personal interview with the author (8 November, 1994 at Dalhousie Law School, Halifax, N.S.).

<sup>57</sup> FAO, *supra* note 29 at 42.

<sup>58</sup> U.S. Policy Statement: *Kokechik v. Secretary of Commerce*, 839 F.2d 795 (1988), cert. denied 488 U.S. 1004 (1989); U.S. Policy Statement on Large-Scale Pelagic Driftnets 4 (submitted to the United Nations Office of Ocean Affairs and the Law of the Sea, July 1990) [hereinafter U.S. Policy Statement] as found in Burke, *supra* note 40.

of fishing because "it is generally accepted that we are ignorant about the abundance and distribution of target species and by catch."<sup>59</sup>

Moreover, this obligation is legally incompatible with the 1982 Convention which only calls for judgments concerning reference points to be based on the "best scientific data available." In contrast with the Driftnet proposal, the draft Agreement is consistent with the 1982 Convention "best scientific data" standard in its application and use of the precautionary principle. Hence, it is more likely to be acceptable to the international community.

The draft Agreement attempts to resolve the outstanding dispute with regard to the compatibility of conservation and management measures between coastal states and IFOS. Article 7.1 states, "Conservation and management measures taken on the high seas and those taken in areas under national jurisdiction shall be compatible in order to ensure conservation and management of the stocks overall." Several provisions indicate that the draft Agreement largely recognizes the coastal states' contention that in determining conservation measures for straddling stocks the coastal state should have a superior position. Article 3 recognizes the sovereign nature of EEZ rights when it states that the Agreement applies to stocks beyond the areas under national jurisdiction. Article 7.1 reaffirms that the Agreement does not prejudice states' sovereign rights. Moreover, Article 7.2a states that in determining compatible conservation measures, coastal states and DWFSS shall "ensure that measures established in respect of the high seas do not undermine the effectiveness of those established in respect of the same stock(s) by coastal states in areas under national jurisdiction." This article recognizes the claim of coastal states that they have a special interest in straddling stocks when the stock resides within EEZ limits for a considerable period of its life cycle. The article also implies coastal state superiority in the formulation of management measures if the coastal state has pre-established measures, since the measures established for the high seas must not undermine the effectiveness of the coastal state measures. Assuming that enclosure principles lead to

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<sup>59</sup> W. Burke, *The New International Law of Fisheries: UNCLOS 1982 and Beyond* (Oxford: Clarendon Press, 1994) at 148; see Burke, *supra* note 40 at 258.

more effective management measures, these provisions enhance the probability of better management.<sup>60</sup>

On the other hand, it is submitted that several provisions of the Agreement also recognize the DWFSS' claim that management measures should take into account the biological unity of specific stocks. Where the stock in issue has a biological life cycle that is rarely within the EEZ area, Article 7.2b can be interpreted to imply that the stock's biological data should have equal weight when determining proper conservation measures. Article 7.2b states that all parties shall

take into account the biological unity and other characteristics of the stock(s) and the relationship between the distribution of the stock(s), the fisheries and the geographical particularities of the region, including the extent to which the stock(s) occur and are fished in areas under national jurisdiction.

Hence, in situations where the stock in issue resides mostly on the high seas, DWFSS could argue that Article 7.2a (preference to the coastal state) should not be enforced. Instead, conservation measures for such stocks should reflect their natural migratory patterns.

Article 7.2c recognizes another DWFSS concern—that the dependence of DWFSS on fish stocks must be accounted for when determining management measures. Article 7.2c recognizes that dependencies are not limited to coastal state communities, but also include communities in DWFSS (such as the Basque in Spain) which have significant proportions of their population working in tradi-

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<sup>60</sup> This presumption is under criticism, however, both in practice and as a theoretical basis for establishing management measures. In practice, the history of Canada's East Coast fishery after Canada's declaration of a 200 mile EFZ does little to demonstrate that enclosure necessarily leads to a more rational management of resources. After the 1977 announcement of Canada's EFZ, fishermen immediately reaped the benefits of access to new resources. This led to an over stimulation of the industry and over capacity on the East Coast. This has added, in part, to the present crisis.

Theoretically, the presumption is under attack by advocates of the "common heritage of mankind" theory, such as Peter Payoyo, who believe that reliance on a theoretical basis that "divides the spoils" on the basis of exclusive property rights, is bound to lead to incessant disagreement and limited success in effective management of species. See above for further discussion of this argument, and P. Payoyo "Fishing For the Common Heritage in Straddling and Highly-Migratory Fish Stocks: A Case Study" (Oceans Institute, 1994) [unpublished].

tional high seas fishery operations. Article 7.2 states that in determining compatible conservation and management measures, both coastal states and states fishing on the high seas shall "take into account the respective dependence of the coastal State(s) and the State(s) fishing on the high seas on the stock(s) concerned." Again, although the coastal state's sovereign rights within its EEZ are not infringed by this rule, there is an indirect qualification on the conservation measures to be established within the EEZ concerning straddling stocks. The coastal state, in establishing conservation measures for specified stocks, must take into account the interests of DWFSS who harvest the same stock on the high seas.

Such limited infringements on EEZ sovereign rights may be perceived as qualifying coastal state sovereign EEZ management rights, which will not be popular amongst many states. However, coastal states should recognize that their long-term conservation goals are better achieved through consistent and compatible measures on straddling stocks, even if internal EEZ management rights might potentially be restricted by high seas interests concerning the same straddling stocks.

## 2. Rights and Duties of Relevant Authority Levels

### *i. IFOs*

Part III of the Agreement provides guidelines for the establishment of IFOs and a clarification of IFO enforcement powers. These characteristics are notably absent in Article 118 in the 1982 Convention. Article 118 provides that

States shall cooperate with each other in the conservation and management of living resources in the high seas . . . [and] as appropriate, co-operate to establish subregional or regional fisheries organizations to this end.

In contrast, the Agreement's Part III provisions explicitly strengthen the role of IFOs; Article 8.3 states that states shall give effect to their duty to cooperate in relation to straddling stock management by participating in all established regional or subregional management organization measures. Moreover, subparagraph 4 states that only those states that participate in or abide by the measures of the relevant IFO "shall have access to the fishery." This provision, in conjunction with the dispute resolution procedures to be analyzed



shortly, provide a more effective legal mechanism to address non-IFO and IFO fishing vessels that do not abide by IFO policies.

Articles 9–12 elaborate in detail the structure and function of future IFOs. These articles also emphasize the need to empower present IFOs. IFOs are to be established in conjunction with agreement amongst relevant fishing parties on such factors as the stock(s) and area to which the measures are to apply, and the mechanisms by which the IFO will obtain scientific advice. Moreover, IFOs are to be the forum for parties to establish and abide by procedures concerning scientific measures, monitoring, control, surveillance and enforcement mechanisms. It should be emphasized that these guidelines are to be agreed upon as the IFO is being established, which will reduce ambiguity of terms and procedures. This in turn should eliminate any delay in members adopting IFO-determined effort levels and other conservation measures once the IFO's reference points are established.

## *ii. Flag States*

In order to be consistent with the 1982 Convention, the Agreement maintains flag state responsibilities over vessels on the high seas. However, in contrast to Article 117 of the 1982 Convention, which states that it is the duty of flag states to ensure their nationals abide by IFO measures, the Agreement provisions are extensively detailed in the specific obligations to which a flag state must agree before its nationals are permitted to fish in IFO managed regions. Article 17.1 states that the flag state must ensure that its vessels comply with regional conservation strategies. Reference to Articles 8.4 (limited access) and 32 indicate that vessels must comply not only with the strategies of IFOs of which they are members, but all established IFO measures. Article 32.1 clearly states:

Where a state does not participate in the work carried out through a subregional or regional fisheries management organization or arrangement, that state is not discharged from the obligation to cooperate in the conservation and management of the relevant stock(s).

Subparagraph 2 goes further and states that

[a] state which does not cooperate with . . . [an IFO] shall not authorize vessels flying its flag to operate in fisheries which are subject to conservation and management

measures established by that organization or arrangement.

Article 17.2 states that no flag state shall authorize any vessels to fish on high seas where it cannot effectively exercise its responsibilities which are detailed extensively in subparagraph 3. As is customary, enforcement provisions remain with the flag state; Article 18 requires the flag state to investigate any alleged violations by its nationals, and to expeditiously report back to the state alleging the violation on the progress and outcome of the investigation.

### *iii. All States*

Part IV constructively expands on Article 94.6 of the 1982 Convention which provides that a state with clear grounds to believe that control of foreign vessels is being exercised improperly may report this fact to flag state. Article 20 gives foreign states greater rights to enforce IFO conservation measures on foreign vessels. Article 20.2 encourages IFOs to establish agreed upon procedures for monitoring, enforcement and surveillance of vessels:

States shall agree on procedures under which the appropriate authorities of one state may board and inspect a fishing vessel flying the flag of another state, including notification requirements and procedures under which one state might arrest and detain a fishing vessel flying the flag of another state.

Subparagraph 3 enables similar boarding and inspection powers to be developed by IFOs for vessels without nationality or flying "flags of convenience." These provisions considerably enhance the powers of foreign state and IFO officers to investigate, report, and even detain foreign vessels allegedly not abiding by the IFO measures.

Will such limitations on the traditional impunity of vessels on the high seas be acceptable to DWFSS and maritime states? To be acceptable, the enforcement provisions must condone only acts of authority that are explicitly for the enforcement of IFO conservation and management goals for certain straddling fish stocks. This provision should not be used to justify a coastal state's furtherance of its domestic goals or interests. This key distinction must be clear. It would appear that the draft Agreement provisions have achieved this clarity.

Presently, Part IV mandates that all states will be subject to mutually agreed-upon IFO standards, and that any state with a reasonable ground for suspecting impropriety by another state can act to enforce the IFO standards instead of relying on the flag state enforcement. If Part IV provisions were expanded so as to authorize coastal state actions not explicitly connected to IFO measures, IFOs could be viewed by DWFSS as permitting coastal state extensions of jurisdictional authority. Such changes would compromise an IFO's "neutral" nature as a forum for the resolution of coastal state-DWFS disputes.

As stated, Part IV provisions should be acceptable to the international community as they condone only IFO-regulated infringements on flag-state sovereign rights. At present, Article 20.1 limits enforcement powers on foreign vessels to powers exercised in accordance with IFO procedures. The provisions mandate effective enforcement but limit the use of the enforcement measures to problems concerning fishing specific stocks. Hence, the times when this power will be legally used will be defined by individual IFOs so that the powers reflect the particular characteristics of the straddling stocks and IFO region.

Judith Swan states that Canada will not ratify the Agreement until Article 20 includes a recognition that a coastal state can legislate emergency functional management measures to conserve straddling stocks.<sup>61</sup> Canada should not seek recognition for coastal states to act unilaterally to enforce conservation measures. Instead, such actions should remain within the prerogative of neutral IFO managers or member state officials who act in accordance with IFO rules, as is endorsed in Article 20. Although Judith Swan is hopeful that this amendment will be accepted prior to the fourth session, Canada should qualify this demand since it is surely going to be a "hard sell" with DWFSS.

The following is a qualification on Canada's proposal.<sup>62</sup> A coastal state should only have to take "emergency" measures when the IFO is ineffective in its enforcement role. In order for coastal state "emergency enforcement powers" to be acceptable to DWFSS, coastal states should accept that such an act would automatically trigger a dispute settlement process whereby a straddling stock arbitral tribunal will evaluate the competing claims. The tribunal will

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<sup>61</sup> Swan, *supra* note 56.

<sup>62</sup> This idea was discussed by the author during an interview with Swan, *ibid.*

determine whether the legislation is genuinely aimed at reasonable conservation measures or whether the legislation is truly a coastal state attempt to promote its own interests in high seas fisheries.

This proposal has several advantages. First, it still gives the coastal state the legal offensive, the right to act to prevent degradation of a resource or habitat when the IFO has not succeeded. This is in accord with an anticipatory management philosophy. Second, the proposal allows for DWFFS to have their arguments heard in order to determine the legitimacy of the legislation. Third, the use of the same tribunal body will lead to a greater degree of expertise, and hopefully, consistency in the tribunal's decision-making. Eventually, this could establish a body of precedent concerning "straddling stock issues," providing states with greater certainty as to the legality of their actions. This ultimately could lessen inter-state disputes.

### 3. Procedures for the Settlement of Disputes

Part VIII of the Agreement is ancillary to the procedures for the settlement of disputes provided for in Part XV of the 1982 Convention. Since these provisions relate to institutional aspects of the law of the sea they have not been tested through implementation. Hence, it is difficult to assess the further contribution made by the Agreement's provisions.

A preliminary overview of the two mechanisms reveals several similarities. Both provisions state that parties have an obligation to settle and encourage parties to use conciliation proceedings or to establish mutually agreed upon ad hoc expert panels to resolve the disputed matter expeditiously. Article 28(3) of the Agreement clearly states that all parties to a dispute, regardless of whether they are members of IFOs, are subject to the 1982 Convention provisions when negotiations fail. For those states that are members of or participants in an IFO, Article 29 mandates IFO members to establish, strengthen or adapt to the new dispensation internal dispute settlement procedures. If acted on, such arrangements will assure a more timely and effective resolution of disputes.

The Agreement does propose several novel additions to the dispute resolution process. First, several provisions propose judicial procedures specifically created for straddling stock issues. The Agreement sets out a detailed arbitration procedure, found in Annex III, which is a model for interested states to use when estab-

lishing their own settlement mechanisms. Annex III also is the basis for the establishment of an arbitral tribunal for resolving straddling and highly migratory stock conflicts. Article 30.2 provides the tribunal with jurisdiction to prescribe provisional measures to prevent damage to the stock(s) in question or to preserve the respective rights of the parties to the dispute.

The proposed arbitral tribunal has several improvements on the International Court of Justice (ICJ). Whereas Churchill and Lowe<sup>63</sup> note that the ICJ has the disadvantage that the parties are not wholly free to determine the composition of the Court,<sup>64</sup> the proposed arbitral tribunal procedures mandate that of the three tribunal members, one will be appointed within a limited time by each party to the dispute, and the third (the President) will be mutually agreed upon.<sup>65</sup>

It is hoped that these changes will result in greater party acceptance of the dispute resolution process. Hitherto, the dispute resolution process has not been popular among states. Moreover, as the tribunal is specialized in regard to straddling stock issues, the tribunal decisions will lead to greater uniformity in decision-making on straddling stock issues throughout the world.

A second feature of the arbitral tribunal is that though its provisional measures may be modified or revoked with a change of the circumstances justifying them, this can only be done after the parties have been given an opportunity to be heard. Again, this feature prevents unilateral actions by states in taking advantage of the uncertainty of facts concerning fishery management. For example, a state might otherwise claim that, according to its scientific evidence, the circumstances justifying the measures have changed so that the measures are no longer needed, and the state might order a resumption of its prohibited activities.

The provisions also emphasize the need for timely and expeditious decision-making procedures, not only within the IFO (see Articles 26, 29), but also in situations where IFO procedures fail, or

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<sup>63</sup> Churchill & Lowe, *supra* note 14 at 333.

<sup>64</sup> It should be noted that a party to a dispute at the ICJ does have some choice of the judiciary; a party has the right to appoint a judge of its choosing if there is no judge of its nationality on the bench. *Ibid.* at 333.

<sup>65</sup> Article 3 of Annex 3 states provides that if the President has not been designated within twenty-one days, the President of the International Tribunal of the LOS shall appoint the President of the arbitral tribunal.

are non-existent, and parties must resort to the use of provisional or Part XV measures (see Articles 30.6). The time limitations increase the likelihood that disputes will be resolved.

#### 4. Resolution of Allocation Issues

In contrast to the improvements noted above, the Agreement does not substantively address allocation issues. In the present draft, Article 10b states that allocation issues will be addressed through regional fishery bodies. Article 16, which addresses a critical issue related to allocation, new participants, similarly does no more than list a number of interested parties that states shall take into account when determining the nature and extent of participatory rights for new members of IFOS.

Two previous draft agreements at the Conference have been criticized by Peter Payoyo for their failure to resurrect and address squarely the allocation issue.<sup>66</sup> Payoyo posits that allocation issues must be addressed first and foremost if the international community wishes to truly resolve the fishery crisis. "Who gets how much of what, and why" must be resolved.<sup>67</sup> Without answers to these questions, Payoyo believes, biological conservation attempts by concerned parties will not be practically made. Payoyo contends that allocation issues can best be resolved by working within the theoretical norm of the "common heritage of humankind," which advocates that all high seas natural resources "must be developed, administered, conserved, and distributed on the basis of international cooperation and for the benefit of all mankind."<sup>68</sup>

Payoyo believes that such an approach could reduce problems of resource allocation. Whereas under the current draft agreement, allocation problems are characterized as competing state property claims to fish, he suggests that a common heritage of mankind framework would re-orient the issues so they become "non-property" claims. After such a regulation, IFOS would not be regulators (as under the present regime), but instead "trustees" of high seas resources. IFO managers would distribute resources according to a common heritage approach involving the sharing of international

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<sup>66</sup> Payoyo, *supra* note 60.

<sup>67</sup> *Ibid.* at 4-5.

<sup>68</sup> *Ibid.* at 9, citing Article III(5) of the "Draft Ocean Space Treaty" (Malta, UN Doc. A/AC.138/53 (August 1971)) (paper submitted by Malta to the UN Seabed Committee in August 1971).

revenues among relevant participants with special emphasis on developing countries receiving funds for their development.<sup>69</sup>

It is difficult to dispute with Payoyo that the present draft agreement does little to address exactly how states or IFOs are to determine who gets access to resources. However, the nature of, and circumstances which have brought about, the UN Conference must be taken into the equation. Once this is done, the Agreement can and should be defended.

The present document is a last-ditch attempt to save the concept of international fishery bodies as managers of straddling stocks. Like-minded coastal states united to realize their common goals at the Conference. Moreover, several members of the "Core Group" (including at present Canada, Chile, Iceland, Argentina, New Zealand, Norway and Peru) proposed to adopt unilateral measures to control high seas fishing should the Conference not achieve an acceptable result.<sup>70</sup>

The Agreement is arguably an action document. It brings substance to the provisions of the 1982 Convention in order to achieve the latter Convention's mandate of establishing IFOs to manage straddling stocks. It does this in explicit terms. The Conference must define principles as well as strengthen and clarify IFO powers in order to provide immediate, effective guidelines. This is its mandate, and, as argued above, it seems to have largely satisfied its objectives.

The purpose of the UN Conference makes the application of a concept such as the "common heritage of mankind" unsuitable. The concept, though potentially beneficial in the long term in achieving a more equitable allocation of resources, is neither well understood nor accepted by the international community as a framework for discussion of living resource allocation.<sup>71</sup>

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<sup>69</sup> *Ibid.* at 36, 39–40.

<sup>70</sup> Meltzer, *supra* note 4 at 327.

<sup>71</sup> Payoyo himself admits that benefit-sharing must "somehow re-enter the main currents of policy discussion" (*supra* note 60 at 44). In addition to not being a "highly debated idea in the 1990s" the concept is in conflict with the relatively recent incorporation of the EEZ concept into international customary law. Moreover, the concepts application in Part XI of the 1982 Convention has been curtailed in the proposed "Draft Resolution and Draft Agreement Relating to the Implementation of Part XI of the 1982 UN Convention" (15 April 1994). This resolution is awaiting 40 signatures before being adopted to operate in conjunction with the rest of the 1982 Convention.

In summary, although the "common heritage of humankind" concept is noble, including it as a framework for the resolution of immediate disputes and crises would spell the end of the UN Conference and jeopardize the future viability of IFOS.

### VIII. SUMMARY OF ANALYSIS

The UN Conference meets its objectives. The above analysis reveals that the 1982 Convention mandate for the establishment of IFOS has been comprehensively advanced in the Agreement. The provisions clarify the requirements for and characteristics of an effective IFO management structure. This will aid in the establishment of future IFOS. The provisions also strengthen IFO state member powers in order to rectify the historical ineffectiveness of IFOS such as NAFO.

### IX. LIKELIHOOD OF SUCCESS

The current international context in which the UN Conference is being held indicates that the Agreement will be affirmed. The threats of unilateral action are real. The Canadian government unanimously adopted legislation to take enforcement action to protect straddling stocks outside Canada's EFZ in the NAFO Regulatory Area. Moreover, Canada's seriousness in taking such unilateral action is revealed by its simultaneous amendment to its acceptance of the compulsory jurisdiction of the ICJ in the Hague. It has done this to preclude any challenge which might undermine Canada's ability to protect the stocks by taking the temporary emergency actions it has.<sup>72</sup> Another member of the "Core Group," Chile, has announced its consideration of a Presential Sea, which would extend coastal state authority to high seas areas adjacent to the EEZ to permit functional management of a vast ocean area in the absence of other regulatory authority and while international negotiations are underway.<sup>73</sup>

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<sup>72</sup> Government of Canada, Press Release NR-HQ-94-30E, "Canada Takes Action to End Foreign Over fishing" (10 May 1994).

<sup>73</sup> See generally F. O. Vicuna, "Toward an Effective Management of High Seas Fisheries and the Settlement of the Pending Issues of the Law of the Sea" (1993) 24 O.D.I.L. 81 at 88. For a critical analysis of the Presential sea concept, see Joyner,



Not surprisingly, DWFSS and maritime nations such as the United States find such unilateral acts to be unorthodox and highly disruptive, for they have the potential to devolve the oceans regime into what Edward Miles calls a "national lakes approach to ocean regime[s]."<sup>74</sup> Since more extensive unilateral acts are the real alternative to a treaty agreement, DWFSS are more likely to accept the Agreement, including its limitations on the traditional monopoly of a flag state's authority over its nationals. This position is evident in a recent United States Department of Defense paper advocating that the United States become a party to the 1982 Convention.<sup>75</sup> The Department finds that the Convention as a whole establishes an ocean regulatory regime that is in the national security interests of the United States.<sup>76</sup> Since the Agreement endorses international organizational management of high seas resources, provides mandatory dispute resolution procedures, and reinforces the clear set of maritime zone boundaries established in the 1982 Convention, it is arguable that these aspects of the Agreement contribute to a stable oceans regime. Consequently, it is in the interests of the United States, with its global military and commercial interests, to ratify the Agreement and the 1982 Convention.

It is also foreseeable that the dispute with regard to the nature of the Agreement is likely to be resolved. During the present inter-session at the UN Conference, officials for the United States and the EU indicated that they perceive the present negotiations as a means to create a binding legal document.<sup>77</sup> If these comments are accepted by other DWFSS, this will be a considerable "victory" for coastal states. It will also increase the chances of the Agreement's provisions being implemented.

Furthermore, states throughout the world are increasingly recognizing the "global" nature of their actions and the need for more concerted international cooperative action. This fact is evident in the keen interest taken by states at the UNCED Conference and in the numerous FAO and UN Conferences on the implementation of

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*supra* note 44; T. A. Clingan, Jr. "Mar Presencial (The Presential Sea): *Deja vu* all over again?—A Response to Francisco Orrego Vicuna" (1993) 24 O.D.I.L. 93.

<sup>74</sup> E. L. Miles, "Preparations for UNCLOS IV?" (1988) 19 O.D.I.L. 421 at 426.

<sup>75</sup> United States of America, Department of Defense, "National Security and the United Nations Convention on the Law of the Sea" (July 1994) [unpublished paper].

<sup>76</sup> *Ibid.* at i.

<sup>77</sup> Swan, *supra* note 56.

the various resolutions agreed to at UNCED. IFOS represent a real and potentially effective forum in which states can realize the need for greater international cooperation.

Recent conciliatory actions in NAFO reveal further hope. In 1992 the EU ceased fishing northern cod on the Nose of the Grand Banks and has agreed to accept all NAFO conservation decisions. In late 1993 NAFO imposed further moratoria on stocks on the Tail of the Grand Banks so as to be in accord with the moratoria imposed by Canada.<sup>78</sup>

Most importantly, the Agreement's ratification is in the interest of distant-water fishing, maritime and coastal states. Ratification will clarify and bolster the legal oceans regime. In contrast, refusal to ratify will seriously undermine the 1982 Convention's goal of order and conservation of ocean resources. Refusal to ratify will also leave Canada and other coastal states with the option of taking further unilateral action. Although such acts seem beneficial in the sense that they have an immediate impact on foreign fishing activities, they are only temporary measures: a unilateral act is only effective if the nation can enforce its claim. Moreover, for nations such as Canada, which are highly dependent on international trade, unilateral acts could affect other vital interests. Hence, if Canada continues to take unilateral action, its international trade with Japan, the United States, and the EU could be affected by retaliatory measures.

In contrast, the UN Conference provides an opportunity to bolster the powers of IFOS which can act as a neutral arena for the competing claims and interests of coastal states and DWFSS. The history of NAFO reveals that the legal structure in which IFOS gained their management and enforcement authority was deficient. The Agreement gives the legal opportunity to rectify and clarify the roles and powers of presently existing and future IFOS. The Agreement also moves towards a reduction in the tension between coastal states and DWFSS with its emphasis on the mutual interest that both parties share in straddling fish stocks, and the larger ecosystem in which the stocks are exploited.

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<sup>78</sup> Government of Canada, Press Release B-HQ-94-19, "The Fisheries Crisis in the Northwest Atlantic" (June 1994).